Immunocept, LLC, et al v. Fulbright & Jaworski Doc. 25

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
JAN 24 2006
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ________ DEPUTY CLERK

IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CAUSE NO. A050A334 SS
	§	
FULBRIGHT & JAWORSKI, LLP,	§	
	§	
Defendant.	§	

DEFENDANT FULBRIGHT & JAWORSKI, LLP'S MOTION FOR PROTECTIVE ORDER, OR, ALTERNATIVELY, TO COMPEL DEPOSITION OF PLAINTIFFS' EXPERT WITNESSES, OR, ALTERNATIVELY, FOR MODIFICATION OF SCHEDULING ORDER

COMES NOW, Fulbright & Jaworski, LLP ("Fulbright"), and files this Motion for Protective Order, or, Alternatively, to Compel Deposition of Plaintiffs' Expert Witnesses, or, Alternatively, for Modification of Scheduling Order, and in support thereof, would respectfully show the Court as follows:

I. SUMMARY

The Plaintiffs have refused to present Dr. Rinaldo Bellomo, their key expert witness and a member of Plaintiff Immunocept's Scientific Advisory Board, for deposition until February 21, 2006 – eight days after the close of discovery, and one day after the deadline for dispositive motions. Two of the Plaintiffs' other expert witnesses rely upon Dr. Bellomo's opinion for their own opinions.

Fulbright has consistently requested, and been unsuccessful in obtaining, an earlier date for the deposition of Dr. Bellomo, and has informed the Plaintiffs that Fulbright's experts

25

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responsive to Dr. Bellomo and to other witnesses that rely upon Dr. Bellomo's opinions cannot be presented until after Dr. Bellomo's deposition testimony.

The Plaintiffs have now drafted subpoenas purporting to command all of Fulbright's experts to appear for deposition on dates *prior* to Dr. Bellomo's deposition. Fulbright therefore moves this Court to act to ensure that there is adequate time to rebut the opinions of the Plaintiffs' experts, either by (1) issuing a protective order stating that Fulbright's experts responsive to Dr. Bellomo's testimony need not appear for deposition until after Dr. Bellomo's deposition; (2) compelling an earlier deposition date for Dr. Bellomo; or (3) modifying the existing Scheduling Order.

II. INTRODUCTION

This is a story about seven little pigs. About ten years ago, the Plaintiffs conducted tests with a "large-pore hemofilter" ("LPHF") on seven little pigs. Those pigs survived longer than seven other pigs that were tested with a conventional hemofilter. Based on those results, the Plaintiffs claim that their hemofilter would have proven successful in humans. This key assumption drives the further assumptions that: (1) their hemofilter would have obtained FDA approval; and (2) their hemofilter would have realized astronomical sales in the marketplace.

Dr. Rinaldo Bellomo, the only Plaintiffs' expert testifying as to the potential success of the hemofilter in humans, will not be made available for live deposition by the Plaintiffs until February 21, 2006. That is ***eight days after the close of discovery***, and ***one day after the deadline for dispositive motions***. (*See* Exhibit A, Scheduling Order.) The Plaintiffs can hardly contend that they had a difficult time tracking down Dr. Bellomo or that they are having a difficult time convincing him to come to the United States for a deposition – he is a long-time member of Plaintiff Immunocept's Scientific Advisory Board and holds options to purchase shares of Immunocept. (Exhibit L, Deposition of David Radunsky, p. 143; Exhibit M, Deposition of James Matson, pp. 9, 289)

The Plaintiffs claim that Fulbright should have obtained broader patent protection for their LPHF technology for the treatment of sepsis. James Malackowski, one of the Plaintiffs' experts, has opined that the Plaintiffs have suffered damages in amounts ranging anywhere from $17.5 million to $171.1 million as a result of Fulbright's alleged negligence. (Exhibit B, Malackowski Report, p. 5.)

III. MR. MALACKOWSKI AND MS. FELDMAN RELY HEAVILY UPON DR. BELLOMO'S OPINION

Dr. Bellomo's expert report speaks in vague terms and concludes that "there is a clear case for a large randomized controlled trial in septic patients to test whether the LPHF can improve survival and/or other important clinical outcomes," and that "the probability that this trial would demonstrate such a clinical benefit is clear, real, and substantial." (Exhibit C, Bellomo Report, p. 13.)

In addition to Dr. Bellomo's testimony regarding the scientific merit of LPHF, the Plaintiffs have designated two experts in an attempt to prove: (1) ultimate approval by the FDA; and (2) realized profits. The experts so designated are Martha Feldman and James Malackowski, respectively. Both of them rely heavily, if not exclusively, upon Dr. Bellomo for their conclusions. (Exhibit B, Malackowski Report, pp. 27, 30, 37; Exhibit D, Feldman Report, p. 7.)

Ms. Feldman offers no opinion of her own at all, instead abdicating her opinion regarding FDA approval to Plaintiff James Matson and to Dr. Bellomo:

> Based on Dr. Bellomo's report and my conversations with Dr. Matson, I understand that there is a real and substantial likelihood that the large pore hemofilter will prove safe and efficacious in the treatment of sepsis and septic shock. Based on this understanding, I also believe that this device will obtain FDA approval for the treatment of sepsis and septic shock.

(Exhibit D, Feldman Report, p. 7.)

Mr. Malackowski similarly accepts wholesale from Dr. Bellomo key variables for his calculation of the damages allegedly suffered by the Plaintiffs. For example, he assumed a maximum penetration rate of 70 percent for the Immunocept technology based upon Dr. Bellomo's opinions. (Exhibit B, Malackowski Report, p. 27.) He relied upon Dr. Bellomo for the pricing estimates of the LPHF. (Exhibit B, Malackowski Report, p. 30.) And he acknowledged that he based the net present value of the invention on Dr. Bellomo's opinions:

> However, ***I ultimately relied on the expert opinion of Dr. Bellomo in assessing the technical and FDA approval risks associated with products embodying the Patent***. Dr. Bellomo characterized the probability of a product embodying the Patent receiving FDA approval and performing consistent with expectations based on the work/testing completed to date as *clear, real, and substantial.* My interpretation of his characterization is a 50 to 70 percent success rate. In my Patent valuation model, I used a 60 percent probability of technical success factor; therefore, I reduced the projected NPV of the Patent by 40 percent.

(Exhibit B, Malackowski Report, p. 37.) Mr. Malackowski readily acknowledges that his opinion regarding a reasonable royalty base for the LPHF assumes "FDA approval and realizing the expected technical results." (Exhibit B, Malackowski Report, p. 30.) The reports of Mr. Malackowski and Ms. Feldman are, in whole or in part, mere shells used as conduits for Dr. Bellomo's opinion to be drawn to its illogical conclusion: that FDA approval would be obtained and that financial success would result.

IV. FULBRIGHT'S EXPERTS THAT WILL REBUT MR. MALACKOWSKI AND MS. FELDMAN ARE ENTITLED TO CONSIDER DR. BELLOMO'S TESTIMONY

Two experts – Dr. David Tweardy of the Baylor College of Medicine and Dr. John Kellum of the University of Pittsburgh – have been designated by Fulbright to testify regarding the potential for the success of the LPHF technology. The Plaintiffs cannot reasonably contend that these depositions should take place before Dr. Bellomo's. In fact, the Plaintiffs have stated: "*we are happy to delay the deposition of your expert that will offer testimony responsive to that provided by Dr. Bellomo until after Dr. Bellomo has testified*." (Exhibit E, Email from Fielding to Gannaway, 12/28/05.) Notwithstanding their promises otherwise, the Plaintiffs have purported to subpoena Drs. Tweardy and John Kellum for dates *prior* to the date provided for the deposition of Dr. Bellomo.

Fulbright has also designated Mr. Phil Phillips and Dr. Keith Ugone to testify regarding FDA approval and damages. Specifically, among other things, they will rebut the testimony of Ms. Feldman and Mr. Malackowski, respectively. Because Ms. Feldman and Mr. Malackowski rely so heavily upon Dr. Bellomo's opinions, Mr. Phillips and Dr. Ugone must have the benefit of knowing the underpinnings of Dr. Bellomo's expressed beliefs regarding the LPHF technology in order to finalize their opinions.

V. SEQUENCE OF EVENTS LEADING TO THE FILING OF THIS MOTION

On December 19, 2005, Plaintiffs designated four testifying experts: Dr. Bellomo, Alan H. MacPherson, Mr. Malackowski, and Ms. Feldman. On December 22, 2005, Fulbright requested that Plaintiffs provide dates for the depositions of their experts. The only date that Plaintiffs offered for the live deposition of Dr. Bellomo was two months later: February 21, 2006.

Fulbright requested earlier dates for Dr. Bellomo's live deposition, and for all of the Plaintiffs' experts' deposition, but Plaintiffs responded that none were available. (Exhibit F, Email from Fielding to Gannaway, 12/27/05; Exhibit G, Letter from Gannaway to Fielding, 1/3/06; Exhibit H, Email from Fielding to Gannaway, 1/5/06.)

Fulbright informed the Plaintiffs early in the process that the unreasonable delay in producing Dr. Bellomo for deposition would have a ripple effect as to the scheduling of the depositions of Fulbright's experts. (Exhibit I, Email from Gannaway to Fielding, 12/27/05.) Nonetheless, the Plaintiffs were unwilling or unable to offer an earlier date, and Fulbright, despite its objection to the scheduling, sent to the Plaintiffs a subpoena for Dr. Bellomo acquiescing to the late date of February 21, 2006 for a deposition. (Exhibit J, Letter from Gannaway to Fielding, 1/6/06.)

To be sure, Fulbright could have noticed Dr. Bellomo for a deposition on a date to which the Plaintiffs had not agreed, or could have sought court assistance, given the untimeliness of the offered deposition. But it did not. Rather, Fulbright noticed the deposition for the date the Plaintiffs proposed, and subsequently (as promised) provided dates for Fulbright's expert depositions shortly after Dr. Bellomo's February 21, 2006 deposition:

Dr. David Tweardy	February 23, 2006
Dr. Keith Ugone	February 27, 2006
Mr. Phil Phillips	March 2, 2006
Dr. John Kellum	March 7, 2006

Apparently not willing to live with the consequences of its own inability to produce its key expert witness for deposition within the discovery deadline (and unwilling to refrain from noticing a deposition of a testifying expert for an unagreed date), the Plaintiffs sent subpoenas to Fulbright's counsel for the following dates:

Dr. David Tweardy	January 31, 2006
Dr. Keith Ugone	February 3, 2006
Mr. Phil Phillips	February 1, 2006
Dr. John Kellum	January 30, 2006

The Plaintiffs have now even gone so far as to notice Mr. Phillips' deposition before Ms. Feldman's, such that Mr. Phillips will not have had the chance to review before his own deposition either Ms. Feldman's testimony about the FDA process or about how her reliance upon Dr. Bellomo's opinions affected her testimony.

Incredibly, after designating a key testifying expert located in Australia and then refusing to provide a date for a live deposition before discovery ends, the Plaintiffs have accused Fulbright's counsel as being "intentionally unreasonable and confrontational." (Exhibit K, Letter from Fielding to Gannaway, 1/11/06.) To the contrary, Fulbright seeks nothing more than a fair chance to rebut the testimony of Plaintiffs' experts. Lest there be any doubt, Fulbright's preference would have been for all expert depositions to take place before the discovery cutoff and before the deadline for dispositive motions. It is Plaintiffs' actions that have made this impossible.

VI. CONCLUSION AND PRAYER

Pursuant to Federal Rule of Civil Procedure 26(c), Fulbright respectfully requests that its Motion for Protective Order be granted, and that this Court direct that the depositions of Dr. David Tweardy, Dr. Keith Ugone, Mr. Phil Phillips, and Dr. John Kellum not take place until after the deposition of Dr. Rinaldo Bellomo.

Alternatively, in accordance with the Scheduling Order, Fulbright moves the Court to compel the Plaintiffs to present all of their expert witnesses for live deposition before the close of discovery.

As a second alternative, Fulbright moves the Court to modify the existing scheduling order to permit an extension of the discovery cutoff and dispositive motions deadline, in light of the delay occasioned by the Plaintiffs' inability to produce a key expert witness before the discovery cutoff or dispositive motions deadline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served as shown below on counsel of record on January 23, 2006.

Via Facsimile and Certified Mail, Return-Receipt Certified
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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he has in good faith conferred with the Plaintiffs in an effort to resolve this dispute without court action.

Geoff A. Gannaway

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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Civil Case No. A:05-CA-334 SS

Immunocept, LLC, Patrice Anne Lee, and James Matson

VS.

Fulbright & Jaworski LLP

Attachments to Document #: 25

Description: Defendant Fulbright & Jaworski, LLP's Motion for Protective Order, or Alternatively, to Compel Deposition of Plaintiffs' Expert Witnesses, or Alternatively, for Modification of Scheduling Order

File Date: January 24, 2006

Prepared by: dm

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